
U.S. Department of Labor
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 84-ERA-1

In the Matter of

WILLIAM A. DUNHAM
Complainant

v.

BROWN ROOT, INC.,
Respondent

MARY L. SINDERSON, ESQ.
Sinderson, Daffin, Flores & Stool
University Bank Plaza
5615 Kirby Drive, Suite 710
Houston, Texas 77005
For the Complainant

BRUCE L. DOWNEY, ESQ.
Bishop, Liberman, Cook, Purcell & Reynolds
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
For the Respondent

Before: ROBERT J. FELDMAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding to impose sanctions, recover damages, and for other relief under Section 210, the Employees Protection

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provisions, of the Energy Reorganization Act (42 U.S.C. para. 5851) and the regulations promulgated thereunder (29 C.F.R. Part 24).

Statement of the Case

His employment having been involuntarily terminated on August 26, 1983, William A. Dunham, the Complainant, duly filed a complaint with the Department of Labor on September 23, 1983, pursuant to Section 210 alleging that Respondent Brown & Root, Inc., his Employer, had wrongfully discharged him for complaining about harassment and intimidation of Quality Control (QC) Inspectors in the coatings department at the construction site of the Comanche Peak Steam Electric Station, Glen Rose, Texas. The relief sought by Complainant included reinstatement, back pay, reimbursement of expenses and legal fees, as well as punitive damages.

Under date of October 18, 1983, the Area Director of the Wage and Hour Division, Employment Standards Administration, notified Respondent that after an investigation, it had been found that Complainant was a protected employee engaging in a protected activity under the Act and that discrimination was a factor in the actions which comprise his complaint; that Complainant was scheduled for termination before the final counseling session at which he was charged with insubordination; and that he was terminated because he was vocal in his opposition to intimidation, harassment and threats made by management to Quality Control Inspectors. Respondent was notified to abate the violation and to provide the following relief: reinstatement, back pay, moving expenses, job hunting expenses, legal expenses, compensatory damages, and purging of his personnel file of any reference to his termination.

Thereafter, Respondent duly appealed by telegram to this office requesting formal hearing pursuant to 29 C.F.R. 24.4. Following a pre-hearing conference and the disposition of numerous motions,[1] the case was fully heard on February 13th and 14th in Fort Worth, Texas. The record was closed upon the filing of the last post-hearing brief on April 6, 1984. A subsequent motion by Respondent to re-open the record for the introduction of newly discovered evidence was denied September 13, 1984.

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By reason of requests from the parties for postponement of the hearing, express stipulations of counsel filed December 7, 1981 and December 12, 1981, and the decision and order on pre-hearing motions dated January 10, 1984 herein, the time constraints of 42 U.S.C. § 5851(b)(2)(A) and of 29 C.F.R . §24.5 and 24.6 have been waived.

Findings of Fact

Complainant William A. Dunham was first employed by Respondent Brown & Root, Inc. in April, 1979, at the South Texas Nuclear project near Bay City, Texas. He worked there as a spray painter, coatings coordinator and in related capacities. In November, 1981, he left his job at Bay City and obtained employment with Respondent at the Comanche Peak Steam Electric Station near Glen Rose, Texas, where he was hired as a Quality Control Inspector in protective coatings. In January, 1983, he was promoted to Lead Inspector in that division.

Respondent is the prime contractor for the construction of the nuclear power plant at Comanche Peak of which Texas Utilities Generating Company (TUGCO) is the managing owner and the Nuclear Regulatory Commissioner (NRC) applicant for a license to operate the plant. The Quality Assurance (QA) Organization there is divided into two groups, the ASME and the non-ASME, the coatings department being part of the latter group. Respondent's Site Quality Assurance Manager (Gordon Purdy) directs the daily activities of the ASME group but is also ultimately responsible for all personnel actions involving Respondent's employees in the Quality Assurance Organization, including those in the non-ASME group whose daily activities are directed by TUGO and Ebasco Services, Inc. Thus Complainant was assigned to work under the direction of EBASCO's QA/QC Supervisor (C. Thomas Brandt), but any personnel actions or decisions affecting his employment status were in the hands of Purdy.

In January, 1983, as a result of statement made by Complainant's immediate QC Supervisor in coatings (Harry Williams) and objections thereto voiced by other Quality Control Inspectors Complainant made a complaint to the NRC, charging harassment and intimidation of inspectors by Williams. During succeeding months, however, Williams

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continued his efforts to restrict the freedom of the coatings QC inspectors to point out quality deficiencies and to write non-conformance reports. Complainant brought that matter to the attention of Purdy, resulting on or about June 14, 1983, in a meeting attended by the TUGCO Quality Assurance Manager (Ronald Tolson), Purdy, Brandt and Complainant. At that meeting Complainant reiterated his complaints about Williams harassing QC coatings Inspectors, and Brandt promised to investigate Complaint's concerns. During the following week or two, Brandt interviewed a number of inspectors and came to the conclusion that Williams was being overrun by the Craft, that the inspectors had lost confidence in him as a supervisor and did not feel that he stood up for their interests. Consequently, he arranged to bring in Evert Mouser of be trained to take over William's job as supervisor of the QC Coatings Inspectors.

Effective July 10, 1983, Complainant was promoted from Level C Inspector to Level B at the request of Williams, authorized by Brandt and approved by Purdy. The promotion was based on certifications and demonstrated proficiency.

In the latter part of July, 1983, Brandt was interviewed by an NRC Investigator with respect to the complaint filed the previous January concerning harassment and intimidation of Coatings Inspectors by Williams. The Investigator did not identify the inspector who had filed the complaint.

On August 18, 1983, EBASCO's Quality Engineering Supervisor in the non-ASME group (M.G. Krisher) represented Tolson and Brandt at a meeting involving Coatings QA/QC and Craft personnel. At the conclusion of the meeting, in response to Krisher's suggestion to discuss specific concerns relative to the Coatings program, Complainant and several other inspectors complained to Krisher about the harassment and intimidation of inspectors. Krisher thereafter found no indications of any intimation, harassment, threats or other excessive pressure from Craft on inspectors.

On August 24, 1983, a meeting was held by two engineering consultants who had come on site to make themselves available for discussion with inspectors of the technical changes being made in the Coatings program. Questions and comments having been invited, Complainant participated actively in the discussion. His comments were openly critical in tone and content, and among other things, he reiterated his complaints

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about harassment and intimidation of inspectors. Although Complainant's conduct was characterized by Krisher and some other witnesses for the Respondent as negative, disruptive and obnoxious, I am satisfied that it may be more fairly and accurately inferred from all of the evidence that Complainant was persistent, noisy and no doubt argumentative. Krisher and Mouser attended the meeting; neither Brandt nor Purdy was present.

Immediately following the meeting, Krisher reported to Brandt that Complainant had created a problem and that something needed to be done about it. After Krisher had described Complainant's attitude and performance, Brandt spoke to one of the consultants who told him that the meeting had not been too effective and mentioned Complainant's demeanor.

On the following day, Brandt spoke to Tolson about the problem and suggested that Complainant be counselled and be given three days off to think about it. Tolson concurred and told Brandt to get in touch with Purdy about it. Later in the day Krisher, Mouser, Williams and Brandt met with Purdy in Brandt's office. They discussed Complainant's conduct at the meeting and Purdy agreed with Brandt's suggestion to counsel him and suspend him for three days.

The following morning, August 26, Tolson advised Purdy and Krisher that to suspend Complainant would be inappropriate due to the elapsed time since the August 24th meeting. He directed them to limit disciplinary action to a counselling session. Purdy then asked Krisher to prepare a counselling report and schedule the session for 4:30 that

afternoon. Krisher prepared a draft counselling report, had it typed, edited the draft, and had the final version typed on Respondent's Employee Counselling and Guidance Report form. He directed Mouser to bring Complainant to Purdy's office at 4:30, with express instructions to refrain from disclosing to Complainant the purpose of the conference.

At the appointed time, Complainant and Mouser appeared at Purdy's office, joining Purdy and Krisher there. Purdy then handed the counselling report (Respondent's Exhibit H) to Complainant and asked him to read it and comment. The report stated that the reason for the conference was "Attitude". It referred to several occasions when Complainant expressed a

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complete lack of confidence in the Coatings QC program, the most recent of which was at the meeting of August 24th during the open information exchange between the consultants and the inspectors, his "continued dominance of the meeting" being described as disruptive, counter-productive and unprofessional. The report concluded with a warning that such attitude and actions would not be tolerated and that further like demonstrations would result in disciplinary action.

After briefly scanning the document, Complainant uttered a vulgar, but impersonal, expletive and stated that he would not change, so they "might as well walk him to the gate." Saying in words or substance that the subject of the counselling report was the real problem in the Coatings department, and repeating his suggestion, he returned the report to Purdy. He was not asked to sign the document. Purdy got up and left the room, taking the report with him, and returned a few seconds later, telling Krisher and Mouser to take Complainant to his work area to collect his personal things and to meet him at the time office.

Purdy went to the time office and stated he wanted to terminate the Complainant as a result of which the latter's personnel file was pulled and an Assignment Termination form (Respondent's Exhibit K) was filled out. Purdy completed and signed the form, checking off Complainant's performance rating as "Fair" and checking the reason for termination as "Insubordination." He added the following explanation:

> Individual at the time of counselling for attitude informed me to take him to the gate, he wasn't changing - in a manner which I consider insubordinate.

When Complainant arrived at the time office, he had to wait for his checks to be prepared and then was asked to sign the Termination form. Instead, in the space provided beneath the printed statement that "the reason checked above is the true reason for termination", he wrote the words "F -----g Lie." Having turned in his badge, Complainant thereupon left the site.

Of the six or seven counselling sessions conducted by Purdy, five resulted in termination of the employees involved.

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Early in September, 1983, Williams, was transferred to another site.

Since September 19, 1983, Complainant has been employed as senior coating inspector by EBASCO at its South Texas Project near Bay City. His hourly wage is $2.90 less than at Comanche Peak.

Under date of December 22, 1983, the NRC served upon TUGCO a Notice of Violation and Proposed Imposition of Civil Penalty stating that their investigation revealed that a TUGCO Quality Control Supervisor at Comanche Peak and intimidated Quality Control personnel working for him inspecting paint coatings in violation of the provisions of 10 C.F.R. part 50, Appendix B, Criterion I. TUGCO was further advised of the proposed imposition of a civil penalty in the amount of $40,000.00 for the violation categorized as Severity Level III in accordance with NRC enforcement policy 10 C.F.R. Part 2, Appendix C. An appeal has been taken from both the violation and the penalty.

The Issues

The issues presented are not complex and may be stated as follows:

I. Did Complainant engage in a protected activity?

II. Was the protected activity a substantial or motivating factor in his discharge?

III. Would Complainant have been discharged but for the protected activity?

An ancillary issue of credibility was raised by Respondent's impeachment of complainant's testimony by the introduction of evidence of his felony convictions. As a result, factual determinations have not been based solely upon Complainant's unsupported assertions. Credibility, however, is a relative concept, and the reputations of Respondent's principal witnesses, Brandt and Purdy, for untruthfulness in relation to discharging surbordinates is a matter of record. See *Atchison v. Brown & Root, Inc.*, 82-ERA-9 (ALJ, December 3, 1982, and Decision of the Secretary, June 10, 1983). Under all circumstances,

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I find that their self-serving testimony is biased in the extreme and is no more worthy of belief than that of Complainant. Consequently the issues herein have not been decided on

the basis of credibility of witnesses, but on the probity of the direct and circumstantial evidence adduced and the inferences fairly and reasonably drawn therefrom.

Conclusions of Law

I. Protected Activity

Section 210 of the Energy Reorganization Act prohibits discrimination against employees as follows:

> Discrimination against employee
> (a) No employer, including a Commission licensee, an applicant for a Commission License, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) -
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
> (2) testified or is about to testify in any such proceeding or;
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954; as amended.
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> 42 U.S.C. □5851

In view of the protective purposes of the Act and the broad language of subsection (3) above, application of the section has not been confined to formal complaints to the NRC. It has been expressly held that Section 210 protects quality control inspectors from retaliation based on internal safety and quality control complaints. *Mackowiak v. University Nuclear Systems, Inc*., 735 F.2d 1159, 1163 (9th Cir. 1984); *Atchinson v. Brown & Root, Inc., supra*, Decision of Secretary at pp. 12-13. To similar effect, see *Phillips v. Department of Interior Board of Mine Appeals*, 500 F.2d 772 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938 (1975); *Donovan v. Stafford Construction Co.*, 732 F.2d 954 (D.C. Cir. 1984).

It is thus not necessary for Complainant to establish that it was solely his complaint to the NRC in January that was protected by the statute and that Respondent knew of it when he was discharged. Of course, a fairly good

circumstantial case of retaliation therefor could be made out that in spite of the June 14th meeting with Purdy, Brandt and Tolson regarding harassment and intimidation of inspectors by Williams, Complainant's promotion effective July 10th, and approved by Brandt and Purdy, shows clearly that he was not then in disfavor. But after Brandt had been informed by an NRC Investigator at the end of July that a complaint had been filed by an unidentified inspector involving harassment and intimidation by Williams, it would not take a genius to put two and two together and at least suspect that the NRC complaint had been filed by Complainant. It was only thereafter that he was found objectionable.

One need not depend, however, upon such inferences to establish the requisite activity. As was pointed out in *Mackowiak* (*supra*), the NRC regulations require licensees and their contractors and subcontractors to give inspectors the authority and organizational freedom required to fulfill their role as independent observers of the construction process (10 C.F.R. Part 50, app. B. at 413), and inspectors must be free from the threat of retaliatory discharge for identifying safety and quality problems. The undisputed direct evidence herein establishes that at the meetings of June 14th, August 18th and August 24th, Complainant persistently complained to management officials about harassment and intimidation of Coatings Inspectors by supervisors. There is not the slightest doubt that in so doing he was engaged in a protected activity.

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II. Retaliatory Motive

There is no need for any speculation as to the Respondent's motives for counselling and discharging Complaint. They are clearly expressed in a single document (Respondent's Exhibit H), the contents of which are not altered in any material way by the testimony of any witness. Because of its prime importance in the resolution of the basic controversy herein, a copy of Respondent's Exhibit H, designated as Employee Counselling and Guidance Report, is annexed hereto as Appendix A.

The typewritten portion of the report states plainly and unequivocally the reason that Complaint was summoned to the counselling session. The reference to several occasions on which complainant verbally expressed a complete lack of confidence is obviously direct to his complaints on June 14th. and August 18th about harassment and intimidation of inspectors. It also reflects the same condition which Brandt found had been caused by Williams. Mention of the specific incident on August 24th, of course, refers again to Complainant's vocal objection to harassment and intimidation. Any possible doubt as to Respondent's retaliatory intent is disspelled by the last typewritten sentence, which states flatly that any recurrence of such complaints (of harassment and intimidation) will result in disciplinary action (i.e., suspension, demotion or discharge). Thus,

Respondent threatens to fire Complaint if he continues to engage in the protected activity, thereby providing him with documentary proof amply sufficient to make out his *prima facie* case.

The same document also furnishes proof of another motive. The handprinted postscript in the lower right-hand half of the report is signed by Purdy and sets forth the facts which he believed to warrant Complaint's discharge for insubordination. Whether his version of what occurred at the counselling session is accurate or not, there is no doubt whatsoever that his explanation articulates a legitimate, non-discriminatory reason for Complainant's termination. It follows that we have a classic case of dual motive. See *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977); *N.L.R.B. v. Wright Line*, 662 F.2d 899 (1st Cir. 1981).

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III. The "But For" Rule

Under both of the above decisions, a violation of an employee protection provision is established by proof that the employee would not have been discharged but for the protected activity, or is negated by proof that he would have been discharged, even in the absence of the protected activity. *N.L.R.B. v. Transportation Management Corp.*, ____U.S. _____, 103 S.Ct. 2469 (1983). Under the rule in *Mt. Healthy* (supra), a constitutional rights case which has been held applicable to violations of Section 210 of the Energy Reorganization Act, the burden of proof shifts to the employer to prove by a preponderance of the evidence that the employee would have been discharged even in the absence of the protected activity. *Consolidated Edison Co. of N.Y., Inc. v. Donovan*, 673 F.2d 61 (2nd Cir. 1982). Judge Campbell's opinion in *Wright Line* (supra) clearly stated that upon the establishment of a prima facie case, it is only the burden of going forward with the evidence that is shifted to the employer, and that the burden of persuasion remains with the complainant; yet the Board's order shifting the burden of persuasion to the employer was enforced, since there was substantial evidence to support the conclusion that the employee was discharged because of his protected activity. Consequently, *Wright Line* is often cited in labor cases to indicate that the burden shifts to the employer to prove by a preponderance of the evidence that the discharge would have taken place in the absence of the protected conduct. See, e.g., *N.L.R.B. v. Vincent Brass and Aluminum Co.*, 731 F.2d 564 (8th Cir. 1984).

In the Fifth Circuit, in which the instant case originated, it was held in a fairly recent decision under Title VII of the Civil Rights Act of 1964 that the ultimate burden of proof is on the plaintiff to establish that the termination would not have occurred but for the protected activity, the Court noting that the *Mt. Healthy* analysis has never been applied to Title VII cases in that Circuit. *McMillan v. Rust*

College, Inc., 710 F.2d 1112 (5th Cir. 1983). In cases under the National Labor Relations Act, however, it is held in the same Circuit that the burden of proof shifts to the employer to establish as an affirmative defense that the same action would have been taken in the absence of the protected activity. See *N.L.R.B. v. Associated Milk Procedures, Inc.*, 711 F.2d 627 (5th Cir. 1983). I am not aware of any decision in the

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Fifth Circuit that determines the application of either rule to alleged violations of Section 210 Of the Energy Reorganization Act. I thus find it in all respects appropriate to be guided by the Supreme Court decisions in *Mt. Healthy* (supra) and *Transportation Management* (supra) in requiring Respondent herein to establish by a preponderance of the evidence that the Complainant's employment would have been terminated even in the absence of his protected activity.

The foregoing discussion of burden of proof is of consequence in the resolution of the issue as to which of the dual motives was controlling. Analysis of the facts leading up to the discharge shows that the proscribed and the permissible reasons were so closely intertwined as to be almost inseparable. Bearing in mind that the express purpose of the counselling session (in itself an adverse personnel action) was to suppress the protected activity (i.e., protesting harassment and intimidation of inspectors), it is clear that when Purdy handed Complainant the counselling report, Complainant read it correctly as a threat of discharge if he did not change his attitude toward such harassment and intimidation. The unmistakable substance of his reply was that he would not change that attitude, so Purdy might just as well "walk him to the gate" (i.e., discharge him right then).

The assigned reason for discharge, however, is not Attitude, but Insubordination. Though he unquestionably refused to comply with Respondent's direction that he cease and desist from engaging in the protected activity, I find no evidence of any disobedience to a lawful order during the counselling session. He did not refuse Purdy's request to comment on it. He discussed it briefly and pointedly, albeit profanely, negatively and belligerently. He did not refuse to sign the report, because no one asked him to sign it. purdy concludes his explanation of the discharge as follows:

Interpreting his response and the response presentation as blatant insubordination, I chose to accept his offer and terminated him for insubordination at 1630 on 8/26/83.

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Respondent's proof falls short of establishing that Complainant was terminated for insubordination in the sense of refusal to obey lawful order. The ultimate

question is whether it proved by a fair preponderance of the evidence that even in the absence of the protected activity, he would have been discharged for insubordination in the broader sense of defiance of authority.

When Purdy handed the counselling report to Complainant, Respondent was providing the latter with an insurance policy against retaliatory discharge. He could continue to complain about harassment and intimidation of inspectors to his heart's content, without fear of reprisal, because he had ironclad documentation of his employer's intent to violate the Act. All he had to do was to avoid any act or omission that would provide Respondent with a legitimate excuse to fire him. At that moment, he was in the driver's seat. But then he blew it. He lost his "cool" and handed Purdy a colorable excuse on a silver platter. It was not just the use of foul language, for we can take official notice that a construction site is not a mid-victorian drawing room, and using four-letter words is as common as wearing hard hats. Nevertheless, it cannot be gainsaid that he openly and vigorously defied the authority of management, and in effect, told Purdy to "take his job and shove it." Section 210 does not require any employer to take that kind of abuse from an employee.

The evidence does not support Complainant's suggestion that the counselling session was a "set-up," or the Area Director's finding that he was scheduled for termination before that session. The reasonable inferences to be drawn from the facts in the record are that Tolson had cautioned against drastic action, but Purdy became exasperated by Complainant's response and fired him on the spot. The claim of insubordination therefore is not pretextual, but provides the genuine impetus for the discharge. That conclusion is in accord with the express view of the Secretary of Labor to the effect that once an employee by his own misconduct provides the employer with a legitimate excuse to fire him, little or no weight should be given to evidence that the discharged employee was preliminarily disciplined in retaliation for engaging in the protected activity. See *Dartey v. Zack Company of Chicago*, No. 82-ERA-2 (Decision of the Secretary, April 25, 1983 at p. 11); see also, *Atchinson v. Brown & Root, Inc.*, supra, (Decision of the Secretary, June 10, 1983 at pp. 25-26).

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Upon the foregoing analysis of the evidence, I am constrained to conclude that Respondent has established by a fair preponderance of the evidence that but for his insubordination as above described, Complainant would not have been discharged, and that therefore his termination was not in violation of Section 210 of the Energy Reorganization Act.

RECOMMENDED ORDER

In view of the foregoing, the above-entitled proceeding is dismissed.

ROBERT J. FELDMAN
Administrative Law Judge

Dated: 30 NOV 1984
Washington, D.C.

RJF/mml

[ENDNOTES]

[1] * At the pre-hearing conference, the claim for punitive damages was withdrawn. Respondent's offer to consent to an order awarding back pay during unemployment, compensatory damages for moving expenses and job-hunting costs, attorney's fees, and purging of his personnel file (but with no admission of liability) was rejected.